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1. [*Weissinger v. Ward*, 704 F. Supp. 349](#)

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Weissinger v. Ward

United States District Court for the Eastern District of New York

February 2, 1989, Decided ; February 6, 1989, Filed

No. 85 CV 0248

Reporter

704 F. Supp. 349 *; 1989 U.S. Dist. LEXIS 1117 **

JOHN J. WEISSINGER, Plaintiff, v. BENJAMIN WARD,
Police Commissioner of the City of New York, and the
NEW YORK CITY POLICE DEPARTMENT, Defendant

Core Terms

pre-dismissal, misdemeanors, on-duty, police officer,
convicted, felony, **oath** of **office**, summarily, hearings,
off-duty

Case Summary

Procedural Posture

Defendants, police commissioner and city police department, brought a motion for summary judgment in an action under [42 U.S.C.S. § 1983](#) by plaintiff former officer that alleged various constitutional **violations** resulting from his dismissal from the police force without a hearing.

Overview

The former officer was convicted of a misdemeanor and was discharged from the police department without a hearing. He brought an action for wrongful dismissal and defendants sought summary judgment. The court previously denied the motion without prejudice but granted the officer an opportunity to show that his rights to equal protection and due process were violated because he alone had been discharged without a pre-dismissal hearing for conviction of a misdemeanor committed while on-duty in **violation** of his **oath** of **office**. The motion was renewed and the court granted the motion. The officer raised no issue of genuine fact because there was no other officer who had been similarly convicted who received a pre-hearing dismissal or was permitted to remain in his position. Once the conviction for a felony or **violation of oath of office** had been established, the conditions of [N.Y. Pub. Off. Law §](#)

[30\(1\)\(a\)](#) were fulfilled and any property or liberty interest in his prior position was lost.

Outcome

The court granted defendants' motion for summary judgment in the former officer's [§ 1983](#) claim of wrongful discharge.

LexisNexis® Headnotes

Governments > State & Territorial
Governments > Employees & Officials

[HN1](#) **State & Territorial Governments, Employees & Officials**

[N.Y. Pub. Off. Law § 30\(1\)\(e\)](#) requires that a policeman's **office** become vacant upon his conviction of a felony or a crime involving a **violation** of his **oath** of **office**. This **oath** of **office** states: I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the **office** of public officer in the Police Department of the City of New York according to the best of my ability.

Governments > State & Territorial
Governments > Employees & Officials

[HN2](#) **State & Territorial Governments, Employees & Officials**

A summary dismissal procedure is proper for officers convicted of felonies and dismissed pursuant to [N.Y. Pub. Off. Law § 30\(1\)\(e\)](#). The public has a right to rest

assured that its police officers are individuals of moral integrity.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Governments > Local Governments > Employees & Officials

[HN3](#) Equal Protection, Nature & Scope of Protection

A municipal employer's policy of firing all convicted ex-felons is violative of equal protection. A municipal employer must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform a particular job.

Governments > State & Territorial
Governments > Employees & Officials

[HN4](#) State & Territorial Governments, Employees & Officials

While conviction for an off-duty **violation** might not have any relationship to a police officer's ability to carry out his duties and may not reflect upon the integrity of a police force, conviction for an on-duty **violation**, where an officer uses his official status to further the crimes committed, reflects directly upon the officer's ability to perform his job and upon the police force of which he is a representative. **Violations** committed by a police officer while on-duty under the mantle of his **office** are a serious breach of the public trust.

Counsel: **[**1]** Lecci, Wolin & Wolin, Hicksville, New York, by: Alan E. Wolin, Esq., Attorneys for Plaintiff.

Peter L. Zimroth, Esq., Corporation Counsel, New York, New York, by: Steven H. Mosenson, Esq., Leslie A. Feiner, Esq., Assistant Corporation Counsel, Attorneys for Defendants.

Judges: Thomas C. Platt, Chief United States District Judge.

Opinion by: PLATT

Opinion


[*350] MEMORANDUM AND ORDER

THOMAS C. PLATT, CHIEF UNITED STATES DISTRICT JUDGE.

Plaintiff, a former New York City police officer, brings this action pursuant to [42 U.S.C. § 1983](#), alleging various constitutional **violations** resulting from his dismissal from the police force without a hearing. The defendants move for summary judgment pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#), on the ground that plaintiff has failed to state and support a claim upon which relief may be granted. This Court has already decided this motion adversely to the plaintiff except to the extent that it gave plaintiff an additional opportunity to show that plaintiff had been denied equal protection of the law or discrimination in **violation** of his due process rights because he alone had been discharged without a pre-dismissal hearing for his conviction of a misdemeanor committed while on-duty which was a **violation** of his **oath** of **office**.

[2]** FACTS

Plaintiff was employed as a police officer from February 9, 1968-July 25, 1983. On July 25, plaintiff was convicted of four counts of criminal facilitation in the fourth degree -- A Class a misdemeanor. Plaintiff was convicted based on a jury's finding that he was aiding individuals who intended to commit insurance fraud, by completing accident reports for damaged cars that had not actually been in accidents, but had instead been acquired from wreckage yards. Immediately following his conviction, plaintiff was summarily dismissed from the police force, pursuant to New York State Public Officers Law [§ 30\(1\)\(e\)](#).

[HN1](#)  [Section 30\(1\)\(e\)](#) requires that a policeman's **office** become vacant upon his conviction of a felony or a crime involving a **violation** of his **oath** of **office**.¹ This **oath** of **office** states:

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the **office** of public officer in the Police Department of the City of New

¹The primary purpose of [§ 30\(1\)\(e\)](#) is to insure that the public's trust in its police officers remains high by removing those whose conduct is a betrayal of that trust. See, e.g. [Toro v. Malcolm](#), 44 N.Y.2d 146, 404 N.Y.S.2d 558, 375 N.E.2d 739 (1978).

York according to the best of my ability.

Plaintiff was also dismissed pursuant to Section 434-14.0(a) of the Administrative Code of **[**3]** the City of New York, which grants the Police Commissioner the power to dismiss summarily a police officer who has been convicted of any criminal offense by a court of competent jurisdiction.

DISCUSSION

Plaintiff seeks damages and reinstatement. He claims that he has been deprived of his right to due process under the [Fourteenth Amendment to the United States Constitution](#) because he was not afforded a pre-dismissal hearing to determine if his conviction constitutes a **violation** of his **oath** of **office**. Plaintiff argues that dismissal without a hearing deprives him of a property interest in his prior position and a liberty interest in his reputation. Plaintiff also argues that his right to equal protection **[*351]** has been denied because other officers who committed misdemeanors were given pre-dismissal hearings or permitted to retain their jobs.

This Court, in a Memorandum and Order dated July 18, 1986, denied defendants' motion for summary judgment without prejudice **[**4]** to make a later showing because of plaintiff's allegations that other officers convicted of misdemeanors were given pre-dismissal hearings or allowed to remain in their positions despite their convictions.² If plaintiff could show this to be true, he would be able to show a property interest in his position, and a pre-dismissal hearing would be required. [Cleveland Board of Education v. Loudermill](#), 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). However, this Court also stated that if defendants could show that all police officers convicted of misdemeanors while *on-duty* involving offenses similar to the present one, i.e., offenses involving a **violation** of one's **oath** of **office**, such as crimes of dishonesty, false statements, etc., were summarily dismissed pursuant to [Section 30\(1\)\(e\)](#), summary judgment would be proper.

After further discovery, defendants submitted a list of eleven officers who were **[**5]** convicted of on-duty

misdemeanors.³ Of those listed, nine of the eleven officers were dismissed summarily and the remaining two officers were permitted to retire.⁴ None of these eleven officers were given pre-dismissal hearings. Plaintiff then submitted the names of four police officers, not on the list submitted by the defendants, whom he claims were permitted to continue working or were given pre-dismissal hearings after conviction.

Of the four officers to whom plaintiff refers, none were in similar circumstances to those of the plaintiff. Two of the named officers were not criminally charged as a result of their incidents. A third officer retired, without a hearing, **[**6]** after being criminally charged for an off-duty assault. Finally, a fourth officer named by the plaintiff was criminally charged with off-duty felony offenses unrelated to his duties as a police officer. While the felony charges against the fourth officer were still pending, the Police Department conducted a disciplinary hearing. Thus, plaintiff has not named any police officer charged with an on-duty misdemeanor who was given a pre-dismissal hearing or permitted to remain in his position.

Plaintiff cites [Furst v. New York City Transit Authority](#), 631 F. Supp. 1331 (1986), in further support of his position. In *Furst*, the Honorable I. Leo Glasser of this Court described a policy of firing employees convicted of felonies as "too broad to accomplish any legitimate governmental purpose." [Furst at 1338](#). Plaintiff claims that no legitimate governmental purpose was accomplished by his dismissal from the Police Department. In *Furst*, Judge Glasser held that the Transit Authority's [HN3](#) policy of firing all convicted ex-felons was violative of equal protection. The Court found that certain felony crimes have no relevance to an individual's work performance and that the broad sweep **[**7]** of the statute deprives many persons of employment. The Court said that in upholding a plan such as this, a municipal employer must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform

³ Defendants state that these eleven cases constitute *all* of the cases for which disciplinary files were opened between 1980 and 1986, the years relevant to this action.

⁴ Both of the retired officers had served on the police force for at least twenty years. Twenty years of active duty is the minimum amount of time required for service retirement eligibility. Plaintiff, having served only fourteen and one half years, could not be eligible for retirement. See, New York City Administrative Code § 13-247.

² The Second Circuit upheld [HN2](#) the summary dismissal procedure for those officers convicted of felonies dismissed pursuant to [§ 30\(1\)\(e\)](#) in [Green v. McGuire](#), 683 F.2d 32 (2d Cir. 1982), finding that the public has a right to rest assured that its police officers are individuals of moral integrity.

a particular job.

The firing plan set out in *Furst* is easily distinguished from that of the New York City Police Department. To begin with, [*352] not all officers convicted of misdemeanors are dismissed summarily; only those convicted of crimes committed while on-duty are dismissed summarily or permitted to retire. Those officers convicted of crimes committed while off-duty are afforded pre-dismissal hearings to determine if the offense is a **violation of the oath of office**. Moreover, *Furst* supports this Court's decision which draws a distinction between on-duty and off-duty **violations**. [HN4](#)^(↑) While conviction for an off-duty **violation** might not have any relationship to an officer's ability to carry out his duties and may not reflect upon the integrity of the police force, conviction for an on-duty **violation**, such as in this case, where an officer uses his official status to further the crimes committed, reflects directly upon the officer's ability **[**8]** to perform his job and upon the police force of which he is a representative. Clearly, the public's trust and confidence in a police officer's ability to enforce the law and protect the public from criminal activity is tied up in the public's belief that police officer's are themselves law abiding members of the community. **Violations** committed by a police officer while on-duty under the mantle of his **office** are a serious breach of that trust.

Additionally, no property or liberty right was denied the plaintiff. Once the conviction for a felony or **violation of oath of office** has been established, the conditions of [Section 30\(1\)\(a\)](#) are fulfilled and any property or liberty interest in a prior position is lost. [Green at 36](#). This Court has previously found plaintiff's conviction was a **violation** of his **oath** of **office**.

CONCLUSION

Plaintiff, having found no officer convicted of an on-duty misdemeanor who received a pre-dismissal hearing, raises no genuine issue of material fact enabling him to go forward with his claim. Therefore, defendants' motion for summary judgment is granted.

SO ORDERED.

Dated: Brooklyn, New York

February 2, 1989